FILED
SEP 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-31

IN THE
Supreme Court of the United States

EMILE FORT, AKA TWIN AND EDGAR DIAZ, AKA HOOK,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NINTH CIRCUIT FEDERAL PUBLIC AND COMMUNITY DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STEVEN F. HUBACHEK
REUBEN CAMPER CAHN
NINTH CIRCUIT FEDERAL PUBLIC AND COMMUNITY DEFENDERS
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467

JEFFREY T. GREEN*
DEPUTY CHAIR, NACDL AMICUS COMMITTEE
HAE-WON MIN LIAO
BRENDA F. ABDELALL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC
(202) 736-8276

Counsel for Amici Curiae

*Counsel of Record

September 7, 2007

[Additional Counsel on Inside Cover and Front Page]

FRED RICHARD CURTNER III
ALASKA FEDERAL PUBLIC DEFENDER
601 West Fifth Avenue,
Suite 800
Anchorage, AK 99501

JON M. SANDS
ARIZONA FEDERAL PUBLIC DEFENDER
850 West Adams Street,
Room 201
Phoenix, AZ 85007-2730

SEAN KENNEDY
CALIFORNIA CENTRAL FEDERAL PUBLIC DEFENDER
321 East Second
Los Angeles, CA 90012-4206

DANIEL J. BRODERICK
CALIFORNIA EASTERN FEDERAL PUBLIC DEFENDER
801 I Street
Sacramento, CA 95814-2510

JOHN T. GORMAN
GUAM FEDERAL PUBLIC DEFENDERS
401 First Hawaiian Bank Building
400 Route 8
Mong Mong, GU 96910

PETER C. WOLFF, JR.
HAWAII FEDERAL PUBLIC DEFENDER
Prince Kuhio Federal Building
300 Ala Moana Boulevard
Suite 7-104
Honolulu, HI 96840-0001

SAMUEL RICHARD RUBIN
FEDERAL DEFENDER SERVICES OF IDAHO, INC.
350 North Ninth Street
Suite 300
Boise, ID 83702

ANTHONY R. GALLAGHER
FEDERAL DEFENDERS OF MONTANA
104 Second Street South
Suite 301
Great Falls, MT 59401-3645

FRANCES A. FORSMAN
NEVADA FEDERAL PUBLIC DEFENDER
411 East Bonneville Avenue
Las Vegas, NV 89101-6632

STEVEN T. WAX
OREGON FEDERAL PUBLIC DEFENDER
1700 One Main Place
101 Southwest Main Street
Portland, OR 97204-3228

ROGER PEVEN
FEDERAL DEFENDERS OF
EASTERN WASHINGTON AND
IDAHO
10 North Post Street
Spokane, WA 99201-0705

THOMAS W. HILLIER II
WASHINGTON WESTERN
FEDERAL PUBLIC DEFENDER
700 Westlake Center Office
Tower
1601 Fifth Avenue
Seattle, WA 98101

QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that Federal Rule of Criminal Procedure 16(a)(2)'s work product exception applies to reports prepared by a local police department without any federal involvement and before any federal criminal investigation or prosecution on the theory that the local police become "agent[s]" of the federal government when the reports are later turned over to the federal government.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI CURIAE*	1
REASONS FOR GRANTING THE PETITION	2
I. THE NINTH CIRCUIT'S RULING ABROGATES LONG-STANDING PRINCIPLES RECOGNIZING THE CRITICAL ROLE OF DISCOVERY IN CRIMINAL PROCEEDINGS	2
II. THE NINTH CIRCUIT'S DECISION WILL HAVE SEVERE RAMIFICATIONS ON DISCOVERY IF UPHELD	6
III. THE NINTH CIRCUIT ERRED IN FINDING THE TERM "GOVERNMENT AGENT" SYNONYMOUS WITH "GOVERNMENT PERSONNEL"	9
CONCLUSION	13

TABLE OF AUTHORITIES

CASES Page

Astoria Fed. Sav. & Loan Ass'n. v. *Solimino*, 501 U.S. 104 (1991) 10
B & G Enters., Ltd. v. *United States*, 220 F.3d 1318 (Fed. Cir. 2000) 11
Bailey v. *United States*, 516 U.S. 137 (1995) 10
Bates v. *United States*, 522 U.S. 23 (1997) 10
Brady v. *Maryland*, 373 U.S. 83 (1963) 3, 9
Dennis v. *United States*, 384 U.S. 855 (1966) 3
FDIC v. *Meyer*, 510 U.S. 471 (1994) 11
Hickman v. *Taylor*, 329 U.S. 495 (1947) 12
Giglio v. *United States*, 405 U.S. 150 (1972) 3, 9
In re Grand Jury, 490 F.3d 978 (D.C. Cir. 2007) ... 10
In re Grand Jury Subpoenas, 318 F.3d 379 (2d Cir. 2003) 12
Keene Corp. v. *United States*, 508 U.S. 200 (1993) 10
Kyles v. *Whitley*, 514 U.S. 419 (1995) 4, 9
Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990) ... 10
Moore v. *Illinois*, 408 U.S. 786 (1972) 6
Morissette v. *United States*, 342 U.S. 246 (1952) ... 10
State v. *Tune*, 98 A.2d 881 (N.J. 1953) 2
United States v. *Agurs*, 427 U.S. 97 (1976) 6
United States v. *Cherry*, 876 F. Supp. 547 (S.D.N.Y. 1995) 8
United States v. *DeBacker*, 493 F. Supp. 1078 (W.D. Mich. 1980) 8, 13
United States v. *Fort*, 472 F.3d 1106 (9th Cir. 2007) 9, 12
United States v. *Gatto*, 729 F. Supp. 1478 (D.N.J. 1989) 8, 13
United States v. *Green*, 144 F.R.D. 631 (W.D.N.Y. 1992) 8, 13
United States v. *Howell*, 231 F.3d 615 (9th Cir. 2000) 4

TABLE OF AUTHORITIES – CONTINUED

Page

United States v. *Jones*, 149 F.R.D. 139 (N.D. Ohio 1993) 8, 13
United States v. *Nobles*, 422 U.S. 225 (1975) 12
United States v. *Ruiz*, 536 U.S. 622 (2002) 2
United States v. *Taylor*, 417 F.3d 1176 (11th Cir.), *cert denied*, 546 U.S. 1047 (2005) 12
Wardius v. *Oregon*, 412 U.S. 470 (1973) 3
Weatherford v. *Bursey*, 429 U.S. 545 (1977) 2
Williams v. *Florida*, 399 U.S. 78 (1970) 6, 7

FEDERAL RULE

Fed. R. Crim. P. 16 ..... 4, 5, 12

LEGISLATIVE MATERIALS

H.R. Rep. No. 94-247 (1975), *reprinted in* 1975 U.S.C.C.A.N. 674 ..... 4, 5
H.R. Conf. Rep. No. 94-414 (1975), *reprinted in* 1975 U.S.C.C.A.N. 713 5

SCHOLARLY AUTHORITY

Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield To New Realities*, 2006 Wis. L. Rev. 541 (2006) 7

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004) 11
Restatement (Third) of Agency (2005) 11
1 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 2007) ... 4

INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and appropriate application of criminal statutes in accordance with the United States Constitution. Consistently advocating for the fair and efficient administration of criminal justice, members of the NACDL have a keen interest in assuring that Federal Rule of Criminal Procedure 16 is applied in a manner that encourages the discovery of information that is material to the guilt or innocence of our clients in criminal proceedings.

The Ninth Circuit Federal and Community Public Defenders represent indigent defendants in federal court in the Ninth Circuit pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. As the institutional defenders for indigent defendants, these organizations have a unique interest in all issues of federal criminal law and a unique perspective to offer the Court concerning discovery in federal criminal cases.

---

[1] Pursuant to Rule 37, *amici curiae* state that both parties have consented to the filing of this brief, and that no party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

REASONS FOR GRANTING THE PETITION

The broad implications of the decision below and the frequent recurrence of the issues in this case warrant the Court's review. Among those implications is a significant retrenchment in the scope of criminal discovery that runs directly contrary to a powerful historical trend towards openness that this Court has endorsed and Congress has enacted into law. Further, because the rule announced in the case is unmoored from the work product doctrine — in particular, its goal in protecting attorney analysis and its corollary concepts of agency — it is destined to create mischief and litigation of the type apparent from this record. It is also destined to create further disputes with respect to the scope of the prosecution's duty to identify and produce exculpatory evidence. And there can be no doubt as to the significance of this case for federal criminal dockets: The Federal Public and Community Defenders in the Ninth Circuit alone conservatively estimate that approximately one third of their caseload involves matters originated by state and local law enforcement authorities. As agency questions would now arise in each of these cases, the Court's review of this issue is warranted.

I. THE NINTH CIRCUIT'S RULING ABROGATES LONG-STANDING PRINCIPLES RECOGNIZING THE CRITICAL ROLE OF DISCOVERY IN CRIMINAL PROCEEDINGS.

Discovery in criminal cases is a crucial phase of criminal proceedings and is absolutely essential to the fair and efficient administration of justice.[2] The Court, in a unanimous

---

[2] While the Court has found that there is no general constitutional right to discovery in criminal cases in *United States* v. *Ruiz*, 536 U.S. 622, 629 (2002) and in *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977), courts have emphasized the need for discovery in criminal cases, and compared that need to the civil rules of discovery. *See State* v. *Tune*, 98 A.2d 881, 896 (N.J. 1953) (Brennan, J., dissenting) ("It shocks my sense of justice

decision, in *Dennis* v. *United States*, 384 U.S. 855 (1966) referred to the "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."[3] *Id.* at 870. In response to a growing number of states recognizing broad discovery rights in criminal proceedings, the Court in *Wardius* v. *Oregon*, 412 U.S. 470 (1973) recognized that "[t]he growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system." *Id.* at 474. The *Wardius* Court further held that "discovery must be a two-way street" and that trials cannot be run as a "search for truth" by the defense, while the prosecution maintains "poker game" secrecy. *Id.* at 475-476. See also *id.* at 474. ("The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.") (citing *Williams* v. *Florida*, 399 U.S. 78, 82 (1970)).

Perhaps the most prominent holding with respect to the constitutional right to evidence in criminal proceedings is *Brady* v. *Maryland*, 373 U.S. 83 (1963), where the Court held that the prosecution has a duty to share exculpatory evidence with criminal defendants.[4] In cases following *Brady*, the Court significantly clarified and established discovery guidelines for criminal proceedings. See *Giglio* v. *United States*, 405 U.S. 150, 154-55 (1972) (finding that the

---

that in these circumstances counsel for an accused facing a possible death sentence should be denied inspection of his confession which, were this a civil case, could not be denied.").

[3] The opinion of the Court was written by Justice Fortas, who was a member of the Advisory Committee on Criminal Rules from 1960 until his appointment to the Court in 1965.

[4] Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

prosecutor has an obligation to disclose exculpatory evidence, which includes evidence impeaching the credibility of the prosecutions witnesses); see also *Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995) (finding under *Brady* that a defendant's failure to request favorable evidence does not leave the government free of all obligation to disclose such evidence to the defendant.).

The Ninth Circuit's broad interpretation of Rule 16(a)(2)'s exception directly contradicts the purpose and intent of Rule 16. Generally, the prosecution is required to allow the defendant access to "documents and tangible objects and reports of examinations and tests within the control of the government that are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial." 1 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3 (3d ed. 2007); see also Fed. R. Crim. P. 16(a)(1)(E). As Judge Wardlaw recognized in her dissenting opinion in the order denying a rehearing in this case, there is no dispute that state and local police investigatory materials are "material to preparing the defense" within the meaning of Rule 16(a)(1)(E). *United States* v. *Fort*, 478 F.3d 1099, 1103 (9th Cir. 2007) (order denying rehearing en banc).

Furthermore, the Ninth Circuit's decision distorts Congress' intent in enacting Rule 16. The inappropriate expansion of the work product exception will render useless Rule 16(a)(1)(E), as the government and the defendant could claim work product on all materials collected prior to federal involvement. The underlying purpose of the Federal Rules of Criminal Procedure is to prevent "cat and mouse" games in criminal proceedings. See *United States* v. *Howell*, 231 F.3d 615, 626 (9th Cir. 2000) (Rule 16 prevents criminal trials from becoming "a sporting contest in which the game of cat and mouse is acceptable."). In contemplating the Federal Rules of Criminal Procedure, Congress specifically discussed their intent to promote greater pretrial discovery. See H.R.

Rep. No. 94-247, at 13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 674, 685 ("[I]t is desirable to promote greater pretrial discovery."). Citing to an Advisory Committee Note, in the context of Rule 16, Congress specifically reiterates:

> [B]roader discovery by both the defense and the prosecution will contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence....

Id. In drafting Rule 16, Congress also stated: "[A] party may not avoid a legitimate discovery request merely because something is labeled a 'report', 'memorandum', or 'internal document'" under Rule 16(a)(2) or (b)(2). See H.R. Conf. Rep. No. 94-414, at 12 (1975), *reprinted in* 1975 U.S.C.C.A.N. 713, 717.

In the present case, the prosecution uses the term "agent" to protect clearly discoverable material in an attempt to avoid legitimate discovery, precisely the type of action Congress sought to avoid. Congress and the drafters of the Federal Rules of Criminal Procedure already contemplated instances in which materials should not be discoverable. Rule 16(d) specifically allows the court discretion to "deny, restrict, or defer discovery or inspection, or grant other appropriate relief." Fed. R. Crim. P. 16(d). Accordingly, the Ninth Circuit's expansion of the scope of Rule 16(a)(2) is unnecessary, as protections and exceptions are already contained with the Federal Rules of Criminal Procedure.

The Ninth Circuit's expansion of the scope of Rule 16(a)(2) will only confuse the proper parameters of discoverable materials to the detriment of fairness and judicial efficiency. It is particularly important for the Court to ensure that there is ample opportunity for the defense to have access to investigatory materials crucial to the determination of

innocence or guilt. See *Williams* v. *Florida,* 399 U.S. 78, 82 (1970). While such openness is plainly consistent with Congressional intent and this Court's precedent, it will also promote judicial efficiency by encouraging more frank discussions between parties and ultimately result in speedier settlements and fruitful trials. Essentially, the door to meaningful discovery will be closed to defendants and prosecutors alike if the Ninth Circuit's decision expanding the scope of Rule 16(a)(2) is not reviewed. Accordingly, we request the Court review the Ninth Circuit's confounding and erroneous decision.

II. THE NINTH CIRCUIT'S DECISION WILL HAVE SEVERE RAMIFICATIONS ON DISCOVERY IF UPHELD.

The Ninth Circuit's decision will lead to perverse results in criminal proceedings, particularly at the district court level. Prosecutors could withhold typically discoverable material or only produce redacted copies. Such mischief will likely clog district court dockets with discovery-related matters, thus hampering efficiency and judicial economy in criminal proceedings. This Court should review the faulty decision, as the exchange of information between parties best serves the interest of justice by reducing surprise at trial, eliminating a "poker game" of evidence, and allowing for parties to prepare for trial in an efficient manner.

The negative implications on discovery will extend to a vast array of criminal proceedings. For example, in murder cases, the types of materials routinely shared by the prosecution includes a variety of investigatory reports, such as ballistic analyses, investigatory materials relating to a crime scene, police reports, and witness lists.[5] The Ninth

---

[5] Prosecutors are under no duty to share all of their materials with the defense. *See Moore* v. *Illinois*, 408 U.S. 786, 795 (1972); *see United States* v. *Agurs*, 427 U.S. 97, 109 (1976) ("[Prosecutors] are under no duty

Circuit's decision will prevent this vital information from being shared with the defendant in cases where the initial investigation was conducted solely by state and local law enforcement authorities. This is not the purpose of Rule 16, and such a reading is clearly contrary to the general principal of meaningful discovery in criminal proceedings. See, *e.g.*, *Williams*, 399 U.S. at 82.

The Ninth Circuit's limitation on discovery enhances the risk of wrongful convictions and unfair sentencing. See Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield To New Realities*, 2006 Wis. L. Rev. 541, 548-49 (2006). Limitations on discovery may also lead to an increase in appellate review if important discoverable materials are not presented early in a case's history. This reduces the integrity of verdicts from lower courts and lessens the finality of verdicts. Judicial economy is best served when important constitutional issues are presented early in a case. Early discovery of such matters reduces the need for appellate review of constitutional issues if such issues are settled and decided early in a proceeding. Additionally, in the interest of judicial economy, discovery in criminal proceedings encourages plea bargaining and can lighten crowded dockets. The Ninth Circuit's decision reduces prosecutorial transparency regarding evidentiary matters, which is imperative to ensure justice and fairness in criminal proceedings.

The Ninth Circuit's expansion of the scope of the work product exception runs contrary to the majority of district court cases that have previously considered this issue. Courts have previously held that to the extent the federal government "has in its possession reports or records from state or local law enforcement agencies or prisons, these items are discoverable unless they are the *product of a joint investigation* or unless they have *become* the work product of the federal

---

to report sua sponte to the defendant all that they learn about the case and about their witnesses." (quoting *In re Imbler*, 387 P.2d 6, 14 (1963))).

investigators." *United States* v. *Green*, 144 F.R.D. 631, 641 (W.D.N.Y. 1992) (emphasis added). In another federal investigation, the court in *United States* v. *DeBacker*, 493 F. Supp. 1078 (W.D. Mich. 1980) found that investigatory materials collected by the state alone, and not in conjunction with a federal investigation, were discoverable. See *id.* at 1082 ("Assistant U.S. Attorney admitted that the investigation of defendant in this case was *not a joint venture* ... but was initiated by the state alone. Therefore ... copies of the state police report now in the hands of the court will be turned over to the defendant....") (emphasis added)). In the present case, there was no *joint investigation* by the federal government and local police department.

Similarly, in *United States* v. *Gatto*, 729 F. Supp. 1478 (D.N.J. 1989), the court ruled that materials collected by various state law enforcement agencies were not excluded under Rule 16(a)(2) because the rule only applies to "work product on the current case, not to investigations and prosecutions from the past." *Id.* at 1481. In *United States* v. *Jones*, 149 F.R.D. 139 (N.D. Ohio 1993), the court also held that only police reports prepared *after* the criminal investigation "acquired its joint city-federal character" were afforded protection under Rule 16(a)(2). *Id.* at 141; but see *United States* v. *Cherry*, 876 F. Supp. 547, 551-52 (S.D.N.Y. 1995) (holding that a local investigation conducted prior to a federal investigation were considered retroactively as "one 'case'" for purposes of 16(a)(2) exceptions and that prior investigatory materials by a local police department were considered to be part of a federal investigation).

The Ninth Circuit decision unsettles the law and only causes confusion as to the scope of "agency" in the context of Rule 16. It is impossible to estimate the exact impact the Ninth Circuit's ruling will have, as a vast number of federal criminal cases entail previous state and local government involvement. The Ninth Circuit Federal Public and Community Defenders conservatively estimate that the

percentage of their cases that either originate by, or involve, state and local law enforcement officers to be anywhere between 16 percent to as high as 60 percent of cases. See Br. of Federal Public and Community Defenders *Amici Curiae* in Support of Defendant-Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc at 2. Because such a large number of cases involve previous state and local law enforcement involvement, the Ninth Circuit's approach will severely hamper discovery proceedings in such cases.

Prosecutors routinely share files with the defense and use an "open file" approach to discovery, as this promotes efficiency and fairness in criminal proceedings. Prosecutors adopt such a transparent approach particularly since it is their duty to identify and produce exculpatory evidence to defendants. See *Kyles*, 514 U.S. 419; *Giglio*, 405 U.S. 150; *Brady*, 373 U.S. 83. The Ninth Circuit's decision will only hinder prosecutorial transparency and lead to unnecessary and excessive litigation regarding discovery related matters.

III. THE NINTH CIRCUIT ERRED IN FINDING THE TERM "GOVERNMENT AGENT" SYNONYMOUS WITH "GOVERNMENT PERSONNEL."

It is simply untenable for the Ninth Circuit to find that the term "[federal] government agent" includes a state or local police department acting in its own capacity long before federal government involvement. A state or local police department acting in an investigation *before* a federal investigation is even initiated cannot be considered an "agent" of the federal government within the plain meaning of the term. Without discussing the basic common law principles of agency and ignoring the plain language meaning of "government agent," the Ninth Circuit erroneously equates Rule 16(a)(2)'s use of the term "government agent" with the Federal Rule of Criminal Procedure Rule 6(e)(3)'s reference to "government personnel." *United States* v. *Fort*, 472 F.3d 1106, 1112-13 (9th Cir. 2007). The Ninth Circuit's circuitous logic equating the two terms disregards the fundamental

principles of statutory construction and interpretation, and flies in the face of well established principles of agency.

Because the term "agent" is not defined in the Federal Rules of Criminal Procedure,[6] the Ninth Circuit should have looked to the well established common law definition of the term "agency" instead of turning to Rule 6's use of the term "personnel." See *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) ("[W]here a common-law principle is well established, . . . the courts may take it as [a] given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'") (internal citations omitted). Where a word or phrase is not defined by statute, and the word has an accepted meaning in common law, courts have assumed that Congress is aware of the meaning of the term when legislation is passed. See *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). In the present case, there is no evidence suggesting that Congress intended for the terms "agent" and "personnel" to be used interchangeably.[7]

---

[6] "[W]here Congress includes particular language in one section of a statute but omits it in another [section of the same Act] . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)); *see also Bates* v. *United States*, 522 U.S. 23, 29 (1997) (inclusion of "intent to defraud" language in one provision and exclusion in a parallel provision); *Bailey* v. *United States*, 516 U.S. 137, 146 (1995) (distinction in one provision between "used" and "intended to be used" creates implication that related provision's reliance on "use" alone refers to actual and not intended use).

[7] As Petitioner observes, the secrecy provisions of Rule 6 serve entirely different purposes than Rule 16 and the latter may frequently trump the former where, for example, defendants may make use of grand jury transcripts at trial. Pet. for Cert. at 6; *see generally In re Grand Jury*, 490 F.3d 978, 990 (D.C. Cir. 2007) (per curium) (holding that grand jury witnesses are entitled to review the transcripts of their own testimony in

In light of the canon of construction that provides that a statutory term that lacks a specific statutory definition should be construed with its ordinary or natural meaning, a more appropriate reading of the term "government agent" would rely upon the traditional meaning of the term "agent." See *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994). "Agency" is defined as a "fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to the act." See Restatement (Third) of Agency § 1.01 (2005). Additionally, *Black's Law Dictionary* defines "agent" as "[o]ne who is authorized to act for or in the place of another." *Black's Law Dictionary* 68 (8th ed. 2004). Furthermore, an agency relationship requires consent of both the principal and the agent. See, *e.g.*, *B & G Enters., Ltd.* v. *United States*, 220 F.3d 1318, 1323 (Fed. Cir. 2000) (no manifestation by either federal government or state of intent to create relationship of agency).

At common law, an "essential element" of agency requires that the agent consent to act on behalf of the principal. See Restatement (Third) of Agency § 1.01 cmt. g. In the present case, an essential element in the creation of an "agency" relationship is missing entirely because the local police department conducted and completed its investigation *before* the federal prosecutor's involvement, and not on *behalf* of the federal prosecutor. As noted in Judge William Fletcher's dissent in this case, the term "agent" is:

> [S]ufficiently broad to encompass state or local law enforcement personnel working alongside, or on behalf of, the federal government, as in a cooperative joint investigation. However, the term does not encompass state and local personnel who *at the time of their actions*

---

private at the U.S. Attorney's Office, a place agreed upon by both parties, or by a place designated by the district court).

> had no authority, real or apparent, from the federal government. That is, the term "agent" requires prior or contemporaneous authorization of the agent by the federal government.

Fort, 472 F.3d at 1125 (emphasis added); see also *United States* v. *Taylor*, 417 F.3d 1176, 1181-82 (11th Cir.), *cert denied*, 546 U.S. 1047 (2005).

The expansion of the scope of agency by the Ninth Circuit exceeds the boundaries of legitimate work product that Rule 16(a)(2) is designed to protect. The "work product exceptions," Rules 16(a)(2) and (b)(2), serve to protect the thoughts and impressions of attorneys. See, *e.g.*, Fed. R. Crim. P. 16 (1975) advisory committee's note D ("Rules 16(a)(2) and (b)(2) define certain types of materials ('work product') not to be discoverable."); see also *United States* v. *Nobles*, 422 U.S. 225 (1975). *Nobles* specifically finds it necessary "that the doctrine protect material prepared by agents *for* the attorney as well as those prepared by the attorney himself." *Id.* at 238-39 (emphasis added). In the present case, it is clear that the local police department was not an agent *for* the federal government. The local police department conducted an investigation long before the federal government became involved.[8] Any document prepared at any time and by virtually anyone prior to federal government involvement in an investigation could arguably be protected as work product under the Ninth Circuit's erroneous logic.

---

[8] As prominently noted in *Hickman* v. *Taylor*, 329 U.S. 495, 510 (1947), the discovery rules governing civil proceedings protect the "files and mental impressions of an attorney." *Id.* at 510; *see also In re Grand Jury Subpoenas*, 318 F.3d 379, 384 (2d Cir. 2003) ("As we previously have made plain, and as Judge Chin correctly recognized, the principle underlying the work product doctrine-sheltering the mental processes of an attorney as reflected in documents prepared for litigation-is not generally promoted by shielding from discovery materials in an attorney's possession that were prepared neither by the attorney nor his agents.").

The Ninth Circuit's interpretation of the work product exception shakes the foundation of the basic principles of agency and the purpose of the work product doctrine itself. Conduct by a state or local police department before involvement by the federal government does not fall within the purview of work product for purposes of Rule 16(a)(2). In the present case, the materials collected and prepared by the local or state government was not prepared *for* the federal government — there was simply no relationship between the two investigations. A state or local police department cannot be considered an "agent" of the federal government if no relationship exists. See, *e.g.*, *Jones*, 149 F.R.D. 139, 141; *Green*, 144 F.R.D. 631, 641; *DeBacker*, 493 F. Supp. 1078, 1082; *Gatto*, 729 F. Supp. 1478, 1481. Accordingly, the materials collected by a state or local police department cannot be shielded as work product if they were not prepared *for* the federal government. Such a tortured definition of "agent" will only sow confusion and result in excessive litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN F. HUBACHEK
REUBEN CAMPER CAHN
NINTH CIRCUIT FEDERAL
PUBLIC AND COMMUNITY
DEFENDERS
225 Broadway, Suite 900
San Diego, CA 92101

JEFFREY T. GREEN*
DEPUTY CHAIR, NACDL
AMICUS COMMITTEE
HAE-WON MIN LIAO
BRENDA F. ABDELALL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC
(202) 736-8276

FRED RICHARD CURTNER III
ALASKA FEDERAL PUBLIC DEFENDER
601 West Fifth Avenue,
Suite 800
Anchorage, AK 99501

JON M. SANDS
ARIZONA FEDERAL PUBLIC DEFENDER
850 West Adams Street,
Room 201
Phoenix, AZ 85007-2730

SEAN KENNEDY
CALIFORNIA CENTRAL FEDERAL PUBLIC DEFENDER
321 East Second
Los Angeles, CA 90012-4206

DANIEL J. BRODERICK
CALIFORNIA EASTERN FEDERAL PUBLIC DEFENDER
801 I Street
Sacramento, CA 95814-2510

JOHN T. GORMAN
GUAM FEDERAL PUBLIC DEFENDERS
401 First Hawaiian Bank Building
400 Route 8
Mong Mong, GU 96910

PETER C. WOLFF, JR.
HAWAII FEDERAL PUBLIC DEFENDER
Prince Kuhio Federal Building
300 Ala Moana Boulvard
Suite 7-104
Honolulu, HI 96840-0001

SAMUEL RICHARD RUBIN
FEDERAL DEFENDER SERVICES OF IDAHO, INC.
350 North Ninth Street
Suite 300
Boise, ID 83702

ANTHONY R. GALLAGHER
FEDERAL DEFENDERS OF MONTANA
104 Second Street South
Suite 301
Great Falls, MT 59401-3645

FRANCES A. FORSMAN
NEVADA FEDERAL PUBLIC DEFENDER
411 East Bonneville Avenue
Las Vegas, NV 89101-6632

STEVEN T. WAX
OREGON FEDERAL PUBLIC DEFENDER
1700 One Main Place
101 Southwest Main Street
Portland, OR 97204-3228

ROGER PEVEN
FEDERAL DEFENDERS OF
EASTERN WASHINGTON AND
IDAHO
10 North Post Street
Spokane, WA 99201-0705

THOMAS W. HILLIER II
WASHINGTON WESTERN
FEDERAL PUBLIC DEFENDER
700 Westlake Center Office
Tower
1601 Fifth Avenue
Seattle, WA 98101

Counsel for Amici Curiae

September 7, 2007

*Counsel of Record